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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DICK D. MOORE, GEORGE LOMBARDI, DALE RILEY, MYRNA TRICKEY, RANDIE KAISER, CRANSTON MITCHELL, JEANIE SCHNEIDER-THIES, CHRISTINE EAVES, TONY GAMMON, WILLIAM BUCK, JENNIFER SACHS, PAUL CASPARI, TED FIRTEG,

Petitioners,

vs.

EVERETT E. KENNISON,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a plaintiff entitled to attorney's fees as a "prevailing party" under 42 U.S.C. § 1988 when he obtains a reversal of a district court's order dismissing his case but when, after remand, his claim is dismissed with prejudice by the district court and he obtains no relief as a result of his litigation?

2. Is it proper to employ a "catalyst" analysis to a plaintiff's request for attorney's fees under 42 U.S.C. § 1988 when plaintiff points to actions taken by a non-party during the course of litigation but plaintiff's claim is dismissed with prejudice by the district court?

3. If it is proper to employ a "catalyst" analysis to a plaintiff's request for attorney's fees under 42 U.S.C. § 1988, although the plaintiff's claim is dismissed with prejudice by the district court, what is the plaintiff's burden of proof in demonstrating his entitlement to fees?

STATEMENT PURSUANT TO RULE 14.1(b)

The names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are found in the caption of this Petition for Writ of Certiorari.

The defendants/appellees to the proceedings below are petitioners herein; the plaintiff/appellant below is respondent herein.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 14.1(b)	ii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	2
Statutes and Constitutional Provisions Involved	3
Statement of the Case	3
Reasons Why the Writ Should be Granted	5
I. THE DECISION OF THE COURT OF APPEALS TO AWARD ATTORNEY'S FEES ON APPEAL TO A PLAINTIFF WHO OBTAINED REVERSAL OF A DISTRICT COURT'S ORDER DISMISSING HIS CASE BUT WHOSE CASE, AFTER REMAND, WAS AGAIN DISMISSED WITH PREJUDICE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND CONSTITUTES SO FAR A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.	5

II. THE DECISION OF THE COURT OF APPEALS TO AWARD ATTORNEY'S FEES ON APPEAL TO A PLAINTIFF WHOSE CASE WAS DISMISSED WITH PREJUDICE, BUT WHO POINTS TO ACTIONS TAKEN BY A NON-PARTY DURING THE COURSE OF LITIGATION IN SUPPORT OF HIS APPLICATION FOR ATTORNEY'S FEES, CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT A PARTY MUST RECEIVE AT LEAST SOME RELIEF ON THE MERITS OF HIS CLAIMS BEFORE HE CAN BE A "PREVAILING PARTY" UNDER 42 U.S.C. § 1988. 9

III. IT IS OF CONSIDERABLE IMPORTANCE THAT THIS COURT CLARIFY THE BURDEN OF PROOF UPON A PARTY SEEKING ATTORNEY'S FEES UNDER 42 U.S.C. § 1988 - WHETHER BY CLEAR AND CONVINCING EVIDENCE OR A PREPONDERANCE - IN SITUATIONS IN WHICH THE PARTY OBTAINS NO FORMAL RELIEF ON THE MERITS. 12

Conclusion 16

Appendix

Appendix A

Judgment of the United States Court of Appeals for the Eighth Circuit, Dated June 29, 1993 ..... A-1

Appendix B

Order of the United States District Court for the Eastern District of Missouri Granting Defendants' Motions to Dismiss for Failure to State a Claim, Dated September 21, 1993 ..... A-8

Appendix C

Memorandum of the United States District Court for the Eastern District of Missouri in Connection With Court's Granting of Defendants' Motion to Dismiss, Dated September 21, 1993 ..... A-10

Appendix D

Appellants Memorandum in Support of Motion for Attorney's Fees A-14

Appendix E

Appellees' Letter to Michael Gans, Clerk of United States Eighth Circuit Court of Appeals, Dated October 26, 1993 ..... A-23

Appendix F

Appellees' Reply to Appellant's Memorandum in Support of Motion for Attorney's Fees A-25

Appendix G

Order by United States Court of Appeals for the Eighth Circuit Awarding Plaintiff's/Appellant's Attorney's Fees, Dated December 14, 1993 ..... A-30

Appendix H

Order by United States Court of Appeals for the Eighth Circuit Denying Defendants'/Appellees' Motion for Reconsideration and Petition for Rehearing or, Alternatively, Rehearing En Banc, dated February 9, 1994 ..... A-31

TABLE OF AUTHORITIES

Page(s)

Cases:

Am. Counsel of the Blind of Colorado, Inc. v. Romer, 992 F.2d 249 (10th Cir. 1993) 10

Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Board, 919 F.2d 374 (5th Cir. 1990) 13

Bernal-Garcia v. I.N.S., 852 F.2d 144 (5th Cir. 1988) . 7

Church of Scientology Flag Service v. City of Clearwater, 2 F.3d 1509 (11th Cir. 1993) 10,14

City of Burlington v. Dague, ___ U.S. ___, 112 S.Ct. 2638 (1992) 12

Collins v. Romer, 962 F.2d 1508 (10th Cir. 1992) 10,13

Crabtree v. Collins, 900 F.2d 79 (6th Cir. 1990) 10,14

Farrar v. Hobby, 506 U.S. ___, 113 S.Ct. 566 (1992) 5,6,10

Friedman v. Arizona, 912 F.2d 328 (9th Cir. 1990)..... 7

Friend v. Kolodzieczak, 965 F.2d 682 (9th Cir. 1992).. 10,13

Hanrahan v. Hampton, 446 U.S. 754 (1980) 7

Hendrickson v. Branstad, 934 F.2d 158 (8th Cir. 1991)..... 10,13

Hensley v. Eckerhart, 471 U.S. 424 (1983) 7,12,14

Hewitt v. Helms, 482 U.S. 755 (1987) .....*passim*

Koster v. Perales, 903 F.2d 131 (2nd Cir. 1990) 10,14

Maher v. Gagne, 448 U.S. 122 (1980) 10

Mosley v. Hairston, 765 F.Supp. 915 (S.D. Ohio 1991) 10,13,15

Pardo v. Hosier, 946 F.2d 1278 (7th Cir. 1991) 15

Paragould Music Co., Inc. v. City of Paragould, Arkansas, 738 F.2d 973 (8th Cir. 1984) 7

Paris v. U.S. Dep't. of Housing & Urban Development, 988 F.2d 236 (1st Cir. 1993) 10,13

Pearson v. Fair, 980 F.2d 37 (1st Cir. 1992) 15

Posada v. Lamb County, Texas, 716 F.2d 1066 (5th Cir. 1983) 10

Proctor v. Consolidated Freightways Corp. of Delaware, 795 F.2d 1472 (8th Cir. 1986) 7

Quinn v. State of Missouri, 891 F.2d 190 (8th Cir. 1989) 7

Rhodes v. Stewart, 488 U.S. 1 (1989) 6,7,8,9

Richardson v. Penfold, 900 F.2d 116 (7th Cir. 1990) ... 7

Strickland v. Lamar County Board of Comm'rs., 807 F.Supp. 121 (M.D. Ga. 1992) 10,13

Texas State Teachers Ass'n. v. Garland Indep. School Dist., 489 U.S. 782 (1989) 6,14

United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980) 10,15

Ustrak v. Fairman, 851 F.2d 983 (7th Cir. 1988) 12

Other Authorities:

28 U.S.C. § 1254 2

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

42 U.S.C. § 1983 3

42 U.S.C. § 1988 5,9,10,12

42 U.S.C. § 1988(b) 3

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PETITION FOR WRIT OF CERTIORARI

Dick Moore, George Lombardi, Dale Riley, Myrna Trickey, Randie Kaiser, Cranston Mitchell, Jeanie Schneider-Thies, Christine Eaves, Tony Gammon, William Buck, Jennifer Sachs, Paul Caspari, and Ted Firteg, defendants in the action below, respectfully pray that a writ of *certiorari* issue to review the Order of the United States Court of Appeals for the Eighth Circuit awarding attorney's fees on appeal, filed December 14, 1993.

OPINIONS BELOW

This petition concerns the award of attorney's fees which was granted in an order of the United States Court of Appeals for the

Eighth Circuit, entered on December 14, 1993. Appendix G. The order followed that Court's reversal of the district court's dismissal of Everett Kennison's (the inmate's) lawsuit for failure to state a claim. The Court had reversed on only one issue (i.e., whether the inmate had stated a claim for an *ex post facto* violation), finding the other issues raised on appeal to be meritless. The Court's opinion, which was unpublished, is reproduced at Appendix A.

On remand, the district court again dismissed the lawsuit with prejudice finding no *ex post facto* violation. The district court's order on remand and memorandum in connection therewith are attached as Appendices B and C.

The inmate's attorney on appeal then submitted a memorandum in support of his motion for attorney's fees. Appendix D. Defendants/petitioners (the "State employees") replied, Appendix F, and submitted a letter to Michael Gans, Clerk of the United States Court of Appeals for the Eighth Circuit, in response to a request for information from the Clerk's office. Appendix E. The Eighth Circuit granted a partial allowance of attorney's fees to the inmate on December 14, 1993. Appendix G.

The State employees then filed a motion for reconsideration and petition for rehearing or, alternatively, rehearing en banc, which was denied on February 9, 1994. Appendix H.

JURISDICTION

The Order of the United States Court of Appeals for the Eighth Circuit allowing attorney's fees was entered on December 14, 1993. The Order of the United States Court of Appeals for the Eighth Circuit denying the State employees' motion for reconsideration and petition for rehearing or, alternatively, rehearing en banc was entered on February 9, 1994. This petition was filed and served in accordance with the rules of this Court within ninety (90) days of February 9, 1994. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1988(b):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The inmate, Everett Kennison, was a state prisoner incarcerated at the Missouri Eastern Correctional Center. While incarcerated, he filed suit under 42 U.S.C. § 1983 against various Department of Corrections officials and employees of the Missouri Board of Probation and Parole (the State employees). The inmate alleged, *inter alia*, that the requirement that he complete the Missouri Sexual Offender Program (MOSOP) prior to eligibility for parole violated the *ex post facto* provisions of the United States Constitution. He asserted jurisdiction in the district court pursuant to 28 U.S.C. §§ 1331 and 1343. The district court dismissed his suit for failure to state a claim.

In an unpublished opinion dated June 29, 1993, the Eighth Circuit reversed on only the *ex post facto* issue, finding the other issues raised on appeal to be meritless. The inmate was represented by appointed counsel on appeal.

On remand, the district court again dismissed the lawsuit with prejudice finding that the requirement that the inmate complete MOSOP for parole eligibility was not a violation of the *ex post facto* clause.

During this litigation, the inmate voluntarily completed MOSOP. He was also released from prison pursuant to Execu-

tive Order 93-18, issued by Missouri Governor Mel Carnahan during the summer of 1993. That summer, severe flooding in the mid-Western United States affected a Missouri Department of Corrections facility, Renz Correctional Center, and inmates had to be evacuated to other prisons. The Executive Order provided that certain inmates could be released from incarceration in order to relieve the resulting prison overcrowding. A condition of the inmates' release was that they were to participate in flood relief activities as directed by their parole officers. Kennison was released pursuant to this Executive Order because he had successfully completed MOSOP during the pendency of this litigation. See Appendices E and F.

The inmate's appointed counsel on appeal requested attorney's fees, but offered no evidence in support of the request. Rather, he submitted a memorandum in which he argued, without any supporting affidavits or other evidence, that the inmate was released 54 days before his originally scheduled release date because the State employees wanted to "cut their losses" and "moot the controversy." The Eighth Circuit granted "an allowance of $2,500.00 on the ground that [the inmate] in this case has prevailed, if at all, only to a slight degree." Judge Wollman dissented and would not have allowed any attorney's fees.

The State employees' motion for reconsideration and petition for rehearing or, alternatively, rehearing en banc was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION OF THE COURT OF APPEALS TO AWARD ATTORNEY'S FEES ON APPEAL TO A PLAINTIFF WHO OBTAINED REVERSAL OF A DISTRICT COURT'S ORDER DISMISSING HIS CASE BUT WHOSE CASE, AFTER REMAND, WAS AGAIN DISMISSED WITH PREJUDICE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND CONSTITUTES SO FAR A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This petition presents the "peculiar-sounding question whether a party who litigates to judgment and loses on all his claims can nonetheless be a 'prevailing party.'" *Hewitt v. Helms*, 482 U.S. 755, 757 (1987). The short answer below should have been "no," and this Court should vacate the lower court's judgment because the inmate was not a "prevailing party" as that phrase is used in 42 U.S.C. § 1988. His claim was dismissed on the merits after remand and he can point to no relief which he obtained as a result of this litigation.

This Court recently reviewed awards of attorney's fees under § 1988 and the definition of "prevailing party" in *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992). In *Farrar*, this Court emphasized that Congress' intent in authorizing fees was "'to permit the . . . award of counsel fees only when a party has prevailed on the merits.'" 113 S.Ct. at 572 (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980)). "'[L]iability on the merits and responsibility for fees go hand in hand. . . .'" 113 S.Ct. at 572 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). After discussing the definition of "prevailing party" upon which

this Court had elaborated in three recent case — *Hewitt v. Helms*, 482 U.S. 755(1987), *Rhodes v. Stewart*, 488 U.S. 1 (1989), and *Texas State Teachers Ass'n. v. Garland Independent School Dist.*, 489 U.S. 782 (1989) — this Court concluded:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, . . . or comparable relief through a consent decree or settlement, ... In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

113 S.Ct. at 573 (citations omitted).

Here, the inmate's suit was initially dismissed by the district court for failure to state a claim; the Eighth Circuit reversed and remanded for examination of the *ex post facto* issue. On remand, the district court again dismissed, finding that the requirement that the inmate complete MOSOP for parole eligibility was not a violation of the *ex post facto* clause. The inmate gained absolutely no relief on the merits of his claim, for the MOSOP requirement was held to be legally appropriate. His claim for injunctive relief also became moot because he elected to complete, and successfully completed, MOSOP during the litigation. He should not have been awarded attorney's fees for losing.

In making its fee award, the Eighth Circuit did not articulate in what way it believed the inmate had prevailed. Rather, the court stated that he had "prevailed, if at all, only to a slight degree." If, by its determination that he had "prevailed, if at all, only to a slight degree," the Eighth Circuit was referring only to Kennison's having obtained a reversal and remand from that court, that court was wrong.

The obtainment of the reversal and remand of the district court's first dismissal of his claim cannot in itself qualify the inmate as a prevailing party for purposes of § 1988. This Court, the Eighth Circuit itself and other courts of appeal have embraced the contrary contention.[1] Generally, the opinions of these courts stand for the proposition that "[a] procedural victory that may be the way station to utter substantive defeat creates no right to fees." *Richardson v. Penfold*, 900 F.2d 116, 119 (7th Cir. 1990). The opinions' common thread is embodied in this Court's observation in *Hewitt v. Helms* that, "Respect for ordinary language requires that a plaintiff receive *at least some relief on the merits* of his claims before he can be said to prevail." 482 U.S. 755, 760 (1987) (emphasis added).

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[1] See, e.g. *Rhodes v. Stewart*, 488 U.S. 1 (1989), *Hewitt v. Helms*, 482 U.S. 755 (1987), *Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980) (party won an interlocutory procedural ruling, which did not establish his entitlement to some relief on the merits of his claim; party was not a "prevailing party"), *Friedman v. Arizona*, 912 F.2d 328, 333 (9th Cir. 1990) (plaintiff won injunction pending appeal but trial court's dismissal of claim affirmed), *Richardson v. Penfold*, 900 F.2d 116, 118-19 (7th Cir. 1990) (appellate counsel successfully reversed summary judgment; no fees "unless and until" plaintiff obtains damages at trial or positive monetary settlement), *Quinn v. State of Missouri*, 891 F.2d 190, 194 (8th Cir. 1989) (district court decision on merits, favorable to plaintiffs, vacated by 8th Circuit), *Bernal-Garcia v. I.N.S.*, 852 F.2d 144, 147 (5th Cir. 1988) (petitioner obtained remand of his case for reconsideration in light of additional evidence), *Proctor v. Consolidated Freightways Corp. of Delaware*, 795 F.2d 1472, 1479 (9th Cir. 1986) (plaintiff obtained reversal of summary judgment and remand for trial), and *Paragould Music Co., Inc. v. City of Paragould, Arkansas*, 738 F.2d 973, 975 (8th Cir. 1984) (plaintiff obtained temporary restraining order, but case dismissed before determination on merits). Fees were awarded in none of these cases.

The plaintiff in *Bernal-Garcia* sought attorney's fees as a prevailing party under the Equal Access to Justice Act (EAJA). 852 F.2d at 147. Fee awards under the EAJA and 42 U.S.C. § 1988 are analyzed similarly. *Hensley v. Eckerhart*, 461 U.S. 424, 433, n. 7 (1983).

For example, in *Hewitt v. Helms*, faced with a similar procedural fact pattern, this Court addressed the "peculiar-sounding question whether a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party.'" 482 U.S. at 757. In that action, also a § 1983 claim, against prison officials for alleged due process violations, plaintiff Helms similarly obtained no relief. "The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim." *Id.* at 760. "That is not the stuff of which legal victories are made." *Id.* Observing that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail," this Court held that plaintiff Helms was not a prevailing party. *Id.*

Rhodes v. Stewart, 488 U.S. 1 (1988), presented a similar fact pattern. There, this Court carried *Hewitt* one step further and reversed an award of fees premised solely on a declaratory judgment that prison officials had violated two prisoners' constitutional rights. 488 U.S. at 4. By the time the district court entered judgment, one of the plaintiffs had died and the other was no longer in custody. *Id.* at 3. The Court reaffirmed that a judgment — declaratory or otherwise — "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Id.* at 4.

Here, the inmate sought not to be required to complete MOSOP prior to becoming eligible for parole, theorizing that the MOSOP requirement violated the *ex post facto* clause. The inmate indeed obtained a reversal and remand of the district court's initial dismissal of his claim, but that maneuver was a mere way station to utter substantive defeat. His claim was dismissed again by the district court in its second incarnation there. Pursuant to the teachings of *Hewitt* and *Rhodes*, and similar cases, the inmate cannot be said to have prevailed, and should not have been awarded fees.

Therefore, this Court should grant *certiorari*. The State employees suggest that this Court could issue an opinion without oral argument, as it did in *Rhodes v. Stewart*, 488 U.S. 1, to clarify this issue.

II. THE DECISION OF THE COURT OF APPEALS TO AWARD ATTORNEY'S FEES ON APPEAL TO A PLAINTIFF WHOSE CASE WAS DISMISSED WITH PREJUDICE, BUT WHO POINTS TO ACTIONS TAKEN BY A NON-PARTY DURING THE COURSE OF LITIGATION IN SUPPORT OF HIS APPLICATION FOR ATTORNEY'S FEES, CONFLICTS WITH DECISIONS OF THIS COURT, THE EIGHTH CIRCUIT, OTHER COURTS OF APPEALS AND DISTRICT COURTS, HOLDING THAT A PARTY MUST RECEIVE AT LEAST SOME RELIEF ON THE MERITS OF HIS CLAIMS BEFORE HE CAN BE A "PREVAILING PARTY" UNDER 42 U.S.C. § 1988.

The inmate here obtained no enforceable judgment against the State employees that would entitle him to attorney's fees under § 1988. He in fact chose to participate in, and successfully completed, MOSOP during the litigation, mooting his claim for injunctive relief. Nevertheless, in his attempt to obtain a fee award, the inmate pointed to his release from prison during this lawsuit and argued that he had been released because the State employees wanted to "cut their losses" and "moot the controversy." The inmate, however, submitted no affidavits, documents or, in fact, any admissible evidence to support his claim.

In limited circumstances not applicable here, a party who does not obtain an enforceable judgment against the defendant from whom fees are sought may be entitled to attorney's fees if the party obtains comparable relief through a consent decree or

settlement. *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566, 573 (1992) (citing *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) and *Maher v. Gagne*, 448 U.S. 122, 129 (1980)). In such situations, courts have employed various versions of what is generally called the "catalyst" test for determining whether the party should be awarded attorney's fees.[2] This Court has not had occasion to examine the precise contours of any such catalyst test for fee awards under § 1988. See *Hewitt v. Helms*, 482 U.S. at 763.

This Court has recently re-emphasized that "to qualify as a prevailing party, a civil rights plaintiff must obtain *at least some relief on the merits* of his claim." *Farrar v. Hobby*, 113 S.Ct. at 573 (emphasis added). Many courts which utilize a catalyst test have incorporated this fundamental requirement into their version of the test. These courts frame their inquiries in two parts: 1) whether a causal connection exists between the suit and the change in the defendant's behavior, and 2) whether the change that resulted was actually required by law. *Paris v. U.S. Dep't. of Housing & Urban Development*, 988 F.2d 236, 241 (1st Cir. 1993), *Collins v. Romer*, 962 F.2d 1508, 1511 (10th Cir. 1992), *Hendrickson v. Branstad*, 934 F.2d 158, 161 (8th Cir. 1991), *Strickland v. Lamar County Board of Comm'rs.*, 807 F.Supp. 121, 124 (M.D. Ga. 1992), and *Mosley v. Hairston*, 765 F.Supp. 915, 918 (S.D. Ohio 1991).

In the present case, the inmate could not satisfy either prong of this version of the catalyst test, let alone both. The State

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[2] *See, e.g., Church of Scientology Flag Service v. City of Clearwater*, 2 F.3d 1509, 1513 (11th Cir. 1993), *Am. Counsel of the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 250 (10th Cir. 1993), *Paris v. U.S. Dep't. of Housing & Urban Development*, 988 F.2d 236, 238 (1st Cir. 1993), *Friend v. Kolodzieczak*, 965 F.2d 682, 684-85 (9th Cir. 1992), *Koster v. Perales*, 903 F.2d 131, 134 (2nd Cir. 1990), *Crabtree v. Collins*, 900 F.2d 79, 82-83 (6th Cir. 1990), *Posada v. Lamb County, Texas*, 716 F.2d 1066, 1071 (5th Cir. 1983) and *United Handicapped Federation v. Andre*, 622 F.2d 342, 346 (8th Cir. 1980).

employees were not, under any circumstances urged by the inmate, required by law to change his parole date by even one day, and there was no evidence that they effected his release because of his lawsuit. In fact, the inmate's release was effected by the inmate's own choice to participate in and complete MOSOP, an act of God (the mid-Western flooding in the summer of 1993), and an Executive Order issued by a non-party in response to the act of God. To permit the inmate, nevertheless, to recover attorney's fees as if he had prevailed on the merits of his claim violates decisions of this Court, the Eighth Circuit, and other courts of appeals and district courts.

To permit the award to stand would also operate to deter prison officials from undertaking any type of ameliorative efforts with regard to inmates involved in litigation for fear of incurring awards of attorney's fees, and would likely chill routine, administrative activities as well. For example, prison officials may require bed space in a maximum security facility for a particular inmate, and decide that a second inmate can and should be moved to a lower security facility to make room. Under the Eighth Circuit's rationale here, however, if the second inmate is suing prison personnel at the time the move is contemplated, the prison officials will feel constrained to look elsewhere for fear of subjecting the defendants to an award of attorney's fees, regardless of whether that inmate ultimately wins his suit.

The same result may even obtain in administrative matters as mundane as intra-prison transfers to housing units which inmates deem "more desirable" for whatever reason. Similarly, prison officials must constantly adjust prison policy and procedure to effectively address the changing dynamics of their institutions. The Eighth Circuit's ruling encourages inmate litigants to point to policy and procedure changes as a basis for fee awards. Indeed, litigation often lasts for years. Under the Eighth Circuit's ruling, an inmate may be able to seek fees if anything favorable happens to him any time during that period.

Congress cannot have intended these results in enacting § 1988. This Court has held that fee applications, including those made pursuant to § 1988, should not spawn burdensome satellite litigation. *City of Burlington v. Dague*, ___ U.S. ___, 112 S.Ct. 2638, 2643 (1992), and *Hensley v. Eckerhart*, 461 U.S. 434, 437 (1983) (request for fees "should not result in second major litigation"). The Seventh Circuit has recognized, however, that:

> Fee litigation has become a heavy burden on the federal courts. It can turn a simple case into two or even more cases — the case on the merits, the case for fees, the case for fees on appeal, the case for fees for proving fees, and so on ad infinitum, or at least ad nauseam. *See Muscare v. Quinn*, 680 F.2d 42 (7th Cir. 1982).

Ustrak v. Fairman, 851 F.2d 983, 987 (1988).

This Court should grant *certiorari*, and reverse and remand this case with directions to deny all fees to the inmate.

III. IT IS OF CONSIDERABLE IMPORTANCE THAT THIS COURT CLARIFY THE BURDEN OF PROOF UPON A PARTY SEEKING ATTORNEY'S FEES UNDER 42 U.S.C. § 1988—WHETHER BY CLEAR AND CONVINCING EVIDENCE OR A PREPONDERANCE—IN SITUATIONS IN WHICH THE PARTY OBTAINS NO FORMAL RELIEF ON THE MERITS.

As mentioned above, courts have not recognized a uniform test for determining whether a party, who does not receive formal legal relief, is a "prevailing party" for purposes of a fee award. Further, the courts, to the extent the issue has been addressed, have not uniformly identified the relevant burden of proof associated with fee awards in such cases. Many courts which utilize a catalyst-type test have generally recognized that the parties seeking fees are required to demonstrate that a causal connection exists between the suit and the change in the defen-

dants' behavior, and that the resulting change was actually required by law.[3] However, no court has specifically identified the parties' burden of proof in doing so, whether by a preponderance of the evidence or by clear and convincing evidence.

In *Collins v. Romer*, for example, the Tenth Circuit struggled mightily with the issue. The court noted that the district court found a "preponderance" and a "rather clear preponderance" of the evidence supported the causal link. 962 F.2d at 1512. The court then agreed that establishment of the causal link was "clear beyond question" and found that the district court had "apparently" based its determination on "ample evidence." *Id.*

Utilizing a different approach, the Fifth Circuit has come close. Under its version of the catalyst test, a plaintiff must establish both that the goal of the lawsuit was achieved and that the suit was a "significant" catalyst in prompting the defendant to take action. *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Board*, 919 F.2d 374, 378 (5th Cir. 1990). Once the plaintiff demonstrates both elements, he has made a *prima facie* case that he is a prevailing party and is entitled to attorney's fees. *Id.* "The burden of proof then shifts to the defendant, who can challenge the entitlement only by showing that its conduct was a 'wholly gratuitous response to a lawsuit that lacked colorable merit.'" *Id.* (citation omitted).

Conversely, the Second Circuit, using yet another analysis, has held that if the plaintiff obtains relief through settlement or the like, which is of the general type demanded in his complaint, he is entitled to a fee award if he can simply "'show a causal

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[3] *See, e.g., Paris v. U.S. Dep't. of Housing & Urban Development*, 988 F.2d 236, 241 (1st Cir. 1993), *Friend v. Kolodzieczak*, 965 F.2d 682, 684-85 (9th Cir. 1992), *Collins v. Romer*, 962 F.2d 1508, 1511 (10th Cir. 1992), *Hendrickson v. Branstad*, 934 F.2d 158, 161 (8th Cir. 1991), *Strickland v. Lamar County Board of Comm'rs.*, 807 F.Supp. 121, 124 (M.D. Ga. 1992), and *Mosley v. Hairston*, 765 F.Supp. 915, 918 (S.D. Ohio 1991)

connection between the relief obtained and the litigation in which the fees are sought.'" *Koster v. Perales*, 903 F.2d 131, 135 (2nd Cir. 1990)(citation omitted). Other courts have simply conducted an analysis pursuant to this Court's opinions in *Texas State Teachers Ass'n. v. Garland Independent School Dist.*, 489 U.S. 782 (1989) and similar cases. *See Church of Scientology v. City of Clearwater*, 2 F.3d 1509, 1513 (11th Cir. 1993), and *Crabtree v. Collins*, 900 F.2d 79, 82 (6th Cir. 1990). Again, however, these courts have failed to articulate the burden of proof placed upon the party seeking attorney's fees.

This Court has never specifically addressed the issue, although in *Hewitt v. Helms* this Court implied that a catalyst theory requires plaintiff to "demonstrate a clear causal link," 482 U.S. at 763, and in his concurring opinion in *Hensley v. Eckerhart*, 461 U.S. 424, 441(1983), Chief Justice Burger wrote that a party must establish his right to fees by "clear and convincing evidence."

In the present case, the inmate offered no evidence in support of his motion for attorney's fees. He simply submitted a memorandum in which he made bald assertions that:

> 1) He was released two months earlier than his release date, 2) at a time "corresponding with the litigation," and 3) that the early release demonstrated an intent on the part of [the State employees] to "cut their losses" and "moot the controversy."

Appendix D, p. A-18.

Under any formulation discussed above, the inmate was not entitled to attorney's fees because the district court ultimately determined that his claim was meritless. That is, the MOSOP requirement did not improperly interfere with the inmate's parole eligibility. Moreover, the inmate's successful completion of MOSOP mooted his claim for injunctive relief. Under no circumstances would the State employees have been legally

required to release the inmate early as a result of his efforts in this lawsuit.

Only the fortuitous natural event of record — flooding — and the resulting prison overcrowding led to the inmate's earlier release from prison, pursuant to the Governor's Executive Order and prior to the district court's second dismissal of the inmate's claim. The inmate pointed to this chronology of events, arguing it demonstrated an intent on the part of the State employees to "cut their losses" and "moot the controversy." While some courts have recognized that the chronology of events can be *an* important factor in determining whether defendants took actions in response to a plaintiff's lawsuit, *Pearson v. Fair*, 980 F.2d 37, 44 (1st Cir. 1992) (court examined chronology and district court's series of detailed injunctive orders); *United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (court examined chronology and testimony of defendant's Special Projects Director), at least two courts have rejected plaintiffs' attempts to rely solely on the chronology of events to support their contentions that their suits were catalysts for changes in the defendants' behavior. *Pardo v. Hosier*, 946 F.2d 1278, 1285 (7th Cir. 1991) ("attorneys for plaintiffs have not presented any facts"), and *Mosley v. Hairston*, 765 F.Supp. 915, 919 (S.D. Ohio 1991). The inmate's similar attempt here should have been rejected.

The conflict between the lower court's award and the opinions of most other courts which have dealt with the issue, as well as the Eighth Circuit's own cases, in conjunction with the absence of any uniform standard for awards in such cases, demands this Court's intervention. The proper burden of proof which the inmate was required to carry below has never been identified, and in view of the absence of any evidence presented by the inmate in support of his fee request, it is of great importance that this Court resolve the conflicting approaches currently in use by the various courts of appeals and clarify the proper burden of proof in such cases.

CONCLUSION

For the reasons stated, the petition for writ of *certiorari* should be granted. The decision of the United States Court of Appeals for the Eighth Circuit allowing attorney's fees to the inmate should be reversed and remanded with directions to deny the fee request in whole. Alternatively, the State employees urge this Court to grant a writ of *certiorari* and clarify the issues presented in this case.

Respectfully submitted,

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